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Nos. 85-334 and 85-376

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

FIRESTONE TIRE & RUBBER COMPANY AND OCCIDENTAL CHEMICAL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ETHYL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant in a civil enforcement action can challenge the validity of an EPA regulation, even though Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), precludes review of the validity of EPA regulations in enforcement proceedings.

2. If we assume that facial review of the validity of a regulation is permissible in an enforcement proceeding, whether the court of appeals correctly concluded that a regulation calling for no discharge of vinyl chloride from relief valves except in an unpreventable emergency is an emission standard within the meaning of Section 112(b) of the Clear Air Act, 42 U.S.C. 7412(b).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 761 F.2d 1153. The decision of the district court in *United States* v. *Ethyl Corporation* (Pet. App. 24a-35a) is reported at 576 F. Supp. 80. The decision of the district court in *United States* v. *Occidental Chemical Corp.* (Pet. App. 12a-23a) is unreported.

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[1]Pet. App. references are to the petitioners' appendix in No. 85-334.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1985. The petition for a writ of certiorari in No. 85-334 was filed on August 28, 1985. The petition for a writ of certiorari in No. 85-376 was filed on August 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1970 amendments to the Clean Air Act (Pub. L. No. 91-604, 84 Stat. 1676 *et seq.)* Congress authorized the Administrator of the Environmental Protection Agency (EPA) to promulgate national emission standards for hazardous air pollutants. § 112(b)(1)(B), 42 U.S.C. 7412(b)(1)(B). Under the statute, the Administrator is to publish a list of hazardous air pollutants and to prescribe an emission standard for such pollutants. 42 U.S.C. 4712(b)(1)(B). An "emission standard" is a "quantitative 'level' to be attained by the use of 'techniques,' 'controls,' and technology.' " *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 286 (1978). Emission standards differ from "work practice standards," which prescribe techniques, controls, and technology to be used rather than establishing a quantitative emission level that must be attained. The Administrator is to "establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. 7412(b)(1)(B).[2]

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[2]In 1977 Congress amended Section 112 (42 U.S.C. 7412) to authorize the promulgation of work practice standards if "it is not feasible" to prescribe a numerical emission limitation because the hazardous pollutant cannot be emitted through a conveyance or cannot be measured. § 112(e)(1) and (2), 42 U.S.C. 7412(e)(1) and (2). The Section authorizes the Administrator to promulgate a "design, equipment, work practice or operational standard" if it is not feasible to prescribe or enforce a numerical emission limitation. 42 U.S.C. 7412(e)(1).

In 1970 Congress also provided for judicial review of the Administrator's action in promulgating emission standards for hazardous air pollutants. Section 307(b)(1), 42 U.S.C. 7607(b)(1), requires a petition for review "of action of the Administrator in promulgating * * * any emission standard" under Section 112(b)(1)(B) to be filed "only in the United States Court of Appeals for the District of Columbia" within 30 days of the Administrator's action.[3] Any action of the Administrator "with respect to which review could have been obtained" under Section 307(b)(1) is not subject to judicial review in "civil or criminal proceedings for enforcement." § 307(b)(2), 42 U.S.C. 7607(b)(2). Section 307(b)(2) is commonly known as the "preclusive review" provision of the Clean Air Act.

2. Vinyl chloride was listed as a hazardous air pollutant pursuant to Section 112(b)(1)(A) (42 U.S.C. 7412(b)(1)(A)) in December 1975. 40 Fed. Reg. 59477-59478 (1975). Evidence had accumulated in the early 1970s showing that vinyl chloride was associated with a rare form of liver cancer, liver angiosarcoma. The preamble to EPA's proposed rulemaking summarized the health data on vinyl chloride exposure. It stated that workers in vinyl chloride plants were shown to experience 3,000 times the risk of developing angiosarcoma as the general population and that animal studies showed angiosarcoma at exposure levels of 50 parts per million (ppm).[4] People living in the immediate vicinity of vinyl chloride plants in 1974 experienced "occasional peak exposure of as high as 33 ppm." 40

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[3]The 1977 amendments to the Clean Air Act enlarged the time in which review may be sought to 60 days. 42 U.S.C. 7607(b)(1).

[4]The Occupational Safety and Health Administration promulgated regulations governing worker exposure to vinyl chloride in 1974. See *Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301 (2d Cir.), cert. denied, 421 U.S. 992 (1975).

Fed. Reg. 59523-59533 (1975). EPA therefore proposed standards for vinyl chloride emissions, including emissions from relief valves. See 40 Fed. Reg. 59536, 59545-59546 (1975). The proposed regulations provided for "no discharge to the atmosphere from any relief valve" except for an emergency. 40 Fed. Reg. 50545 (1975). The preamble to the proposed regulations explained that a "zero emission limit is being proposed for relief discharges which can be prevented." 40 Fed. Reg. 59539 (1975).

In response to the notice of proposed rulemaking, 24 vinyl chloride companies submitted comments, including petitioners Ethyl Corporation, Firestone Plastics Co., and the predecessor of Occidental Chemical Corporation. 41 Fed. Reg. 46560, 46561 (1976). Several industry comments were directed to the proposed relief valve regulations.[5] The final relief valve regulations were slightly modified versions of the proposed regulations. They provide that there be no discharges from automatic or manual relief valves "except for an emergency" discharge. The regulations define an emergency discharge as one that could not have been prevented "by taking measures to avoid the discharges." 40 C.F.R. 61.64(a)(3), 61.65(a). They also require companies to notify the EPA of relief valve discharges within 10 days of their occurrence. The final regulations were promulgated on October 21, 1976, and became applicable to existing sources on January 20, 1977. 41 Fed. Reg. 46560 (1976). See § 112(c)(1)(A), 42 U.S.C. 7412(c)(1)(A). No action challenging the final relief valve regulations was filed in the District of Columbia Circuit.

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[5]Petitioner Firestone argued that a negligence standard should be employed in determining whether relief valve discharges attributable to operator error were preventable. II Office of Waste Management, U.S. Environmental Protection Agency, *EPA-450/2-75-009b, Standard Support and Environmental Impact Statement,* at 2-47 (1976).

3. a. A civil enforcement action against the Ethyl Corporation was commenced in February 1983. The complaint sought civil penalties and an injunction to remedy repeated relief valve discharges of vinyl chloride from the company's facility at Baton Rouge, Louisiana. The complaint alleged 81 discharges from automatic relief valves, in violation of 40 C.F.R. 61.65(a), totalling 168,622.7 pounds of vinyl chloride between March 18, 1977, and April 30, 1982. It also charged the company with 17 discharges from manual relief valves, in violation of 40 C.F.R. 61.64(a)(3), totalling 14,596 pounds of vinyl chloride between July 14, 1978, and January 11, 1982. Pet. App. 25a. The complaint requested civil penalties and an injunction to require Ethyl Corporation to develop and implement a remedial program to prevent future vinyl chloride discharges.

In April 1983 Ethyl filed a motion to dismiss, claiming that the relief valve regulations constituted work practice standards which were unauthorized by the Clean Air Act when the regulations were promulgated in 1976. Accordingly, the company claimed that the regulations were unenforceable as a matter of law. The district court, relying on *Adamo Wrecking,* ruled that it had jurisdiction, despite the preclusive review provision, to determine whether the relief valve regulations were emission standards within the meaning of the Clean Air Act (Pet. App. 28a-29a). It then ruled that the relief valve regulations are work practice standards because the trial court, in an enforcement action, would have to inquire into the measures the company employed to avoid emergencies in order to determine whether there had been a violation. Accordingly, the district court declared the relief valve standards unenforceable and dismissed the case. Pet. App. 32a-35a.

b. A civil enforcement action against Occidental Chemical Corporation and Firestone Tire and Rubber Company was commenced in July 1983 (Pet. App. 13a). Occidental

owns and operates a polyvinyl chloride plant in Addis, West Baton Rouge Parish, Louisiana. It purchased this plant in November 1980 from Firestone Tire and Rubber Company, which owned and operated the plant prior to that date. The complaint alleged that Firestone discharged a total of approximately 5,011 pounds of vinyl chloride from relief valves, in violation of 40 C.F.R. 61.65(a), in 21 episodes between March and October of 1980. It further alleged that Occidental discharged a total of 2,120 pounds of vinyl chloride on nine occasions between January 1981 and February 1982. In addition, the complaint charged that Firestone, on all 21 occasions, and Occidental, on two occasions, failed to report relief valve discharges in the 10-day period specified in 40 C.F.R. 61.65(a).

Firestone and Occidental filed motions to dismiss the complaint based upon the district court's decision in the *Ethyl* case. In response, the government filed a motion to stay proceedings pending the outcome of its appeal in the *Ethyl* case. The district court denied the stay motion, and dismissed the action without issuing an opinion. Pet. App. 22a-23a.

4. The court of appeals consolidated the two cases and reversed. The court ruled that Section 307(b)(2) on its face divested the district court of jurisdiction over petitioners' challenge to the relief valve regulations (Pet. App. 5a). It further ruled that this Court's decision in *Adamo Wrecking* is limited to criminal prosecutions, so that the Court's holding that a district court in a criminal enforcement action may determine whether or not the regulation that the defendant allegedly violated is on its face an "emission standard" does not extend to these civil enforcements actions (Pet. App. 5a-9a).[6] The court of appeals also found

[6]The court noted that the companies had not invoked considerations of due process to escape the preclusive effect of Section 307(b)(2) and that they probably lacked standing to do so since they all participated in the rulemaking proceedings in 1976 (Pet. App. 8a-9a n.8).

that if *Adamo Wrecking* applied so that a limited inquiry into the relief valve regulations was warranted, the regulations were on their face emission standards (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.[7]

1. Petitioners' major submission is that the court of appeals erred in refusing to apply *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978), to these civil enforcement actions. In *Adamo Wrecking,* this Court held that a defendant in a criminal prosecution brought to enforce asbestos regulations promulgated under the Clean Air Act could raise the issue of "whether the regulation which the defendant is alleged to have violated is on its face an 'emission standard' " (434 U.S. at 285). The Court stressed that the reviewing court in such a case is to conduct a "narrow inquiry" (*ibid.*).[8]

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[7]Since the court of appeals reversed and remanded for trial, petitioners' contentions are not yet ripe for review. If petitioners prevail at their trials, their contentions will be moot. If, on the other hand, they are held liable for damages and those determinations are upheld on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. For this reason as well, review by this Court is unwarranted.

[8]The issue on the merits in this case differs substantially from that decided in *Adamo Wrecking.* In *Adamo Wrecking,* the government admitted that the contested regulation was a "work practice" standard. See Brief for the United States at 5, 28-29. The question considered by the Court, therefore, was whether a work practice standard constituted an emission standard within the meaning of the statute. In the present case, the government does not consider the vinyl chloride relief valve regulations to be "work practice" standards. Accordingly, petitioners' claims here required the courts to determine whether the relief valve

The short answer to petitioners' argument is that the court of appeals afforded the petitioners the inquiry mandated by *Adamo Wrecking* in criminal cases in reversing the district court. The court of appeals held that, to the extent a "limited inquiry is warranted" for jurisdictional purposes (Pet. App. 9a & n.9), it "had no trouble labeling the regulations as emission * * * standards" since they set "a 'no discharge' cap on the amount of vinyl chloride" that can be emitted (*id.* at 10a). The court's resolution of this question—that the regulations are emission standards rather than work practice standards--is in conformity with the decisions of all the other lower federal courts (excluding the district court here) that have considered the matter. *United States* v. *Borden, Inc.*, 572 F. Supp. 684 (D. Mass. 1983); *United States* v. *Conoco, Inc.*, No. 83-1916-E (W.D. Okla. Jan. 23, 1984); *United States* v. *B.F. Goodrich Co.*, 609 F. Supp. 1 (W.D. Ky. 1984). Thus, if a federal court must review the facial validity of a regulation in a civil enforcement action under the Clean Air Act, that review was afforded petitioners by the Fifth Circuit, which held, in conformity with the decisions of three district courts, that the relief valve regulations are emission standards.[9]

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regulations should be interpreted as "work practice" standards contrary to the interpretation of the Administrator. In such circumstances, the interpretation of the Administrator is normally entitled to deference. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 17, 1985), slip op. 9-10; *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6.

[9]Moreover, because this interpretation helps to effectuate the purposes of the Act, it has properly been adopted by the courts. As this Court explained in resolving a similar definitional question under the Federal Food, Drug, and Cosmetic Act, "the 'natural way' to draw the line 'is in light of the statutory purpose.' " *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969), quoting *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953).

As Firestone's submission demonstrates (Pet. 11-14), petitioners seek far more than facial review of the vinyl chloride relief valve regulations. Firestone submits enforcement memoranda as evidence that the regulations should be interpreted as work practice standards (*id.* at 11-12), and relies upon the injunctive relief sought in the complaints to show that measures were necessary to comply with the regulations (*id.* at 13). Such evidence, of course, is irrelevant to the "facial inquiry" petitioners purport to seek. More significantly, use of such materials could convert any Clean Air Act regulation into a work practice standard. All emission standards require measures—installation of equipment or changes in operating procedures—for their attainment. An individualized study of the measures taken by a polluter and the possible additional procedures and equipment available to reduce emissions is relevant to the decision to take enforcement action and to the formulation of the appropriate form of injunctive relief to request.[10] If consideration of such matters shows that the regulation sought to be enforced is a "work practice standard," then many Clean Air Act regulations promulgated before 1977 may be subject to invalidation.

In short, the court of appeals afforded petitioners the limited inquiry into the facial validity of the relief valve regulations that they purport to seek. Moreover, since the 1977 amendments to the Clean Air Act, the Administrator

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[10]For example, in *United States* v. *West Penn Power Co.*, 460 F. Supp. 1305, 1307 (W.D. Pa. 1978), the United States brought action to enforce a requirement that a power plant not "emit sulfur dioxide in excess of .6 pounds per million BTU." The relief requested by the United States was an order directing that a flue gas desulferization system be installed (*id.* at 1307-1308), and such an order was entered by the district court (*id.* at 1319). Cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 318 (1982) (creation of compliance orders under the Clean Water Act).

has been authorized to promulgate work practice standards. See note 2, *supra*. Hence, the distinction between emission standards and work practice standards is of limited significance for the future. As a result, there is no substantial reason for this Court to review the universal conclusion that the vinyl chloride relief valve regulations are valid on their face as emission standards.[11]

2. In addition, it is not clear that even a facial inquiry is appropriate in a civil enforcement action. This Court rested its holding *Adamo Wrecking* on the "stringent sanctions," including imprisonment, which may be imposed for criminal violations of the Clean Air Act (434 U.S. at 283). The Court stressed that Congress had created a number of special rules regarding criminal liability under the Act and that it has "imposed *civil* liability for a wider range of violations of the orders of the Administrator than those for which it has imposed *criminal* liability" (*id.* at 282 (emphasis in original)). Moreover, invoking the rule of lenity, a standard of statutory construction used only in criminal cases, this Court ruled that, if there were doubts, they were to be "resolved in favor of the defendant" (*id.* at 285 (citation omitted)).

As the court of appeals concluded, "the Court rested its holding in *Adamo Wrecking* on the nature of a criminal prosecution" and its rationales are not "applicable in the context of civil proceedings" (Pet. App. 6a-7a). In contrast to the rule of lenity, deference is to be afforded the interpretations of the Administrator concerning EPA's statutes and

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[11]Ethyl attacks (Pet. 14-15) the court of appeals' footnote (Pet. App. 8a-9a n.8) suggesting that the petitioners would probably lack standing to raise a due process claim because they commented on the regulations at the time of their promulgation. Ethyl's contention that the court's footnote creates a constitutional problem under the equal protection component of the Due Process Clause is without merit since petitioners never raised a due process claim below.

regulations in civil actions. *Train* v. *NRDC,* 421 U.S. 60, 75 (1975); see *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). As the Court noted in *Adamo Wrecking,* Congress imposed civil liability for a wide variety of violations of the Act. And, of course, imprisonment cannot be imposed in a civil enforcement action.

Petitioners argue that criminal standards should be applied to these civil enforcement actions because they are indistinguishable from criminal actions. Petitioner Firestone claims (Pet. 7) that there is no meaningful difference between civil and criminal proceedings under the Clean Air Act because the maximum daily penalty or fine specified in Act, $25,000 a day, is the same under both civil and criminal enforcement provisions. § 113(b) and (c)(1), 42 U.S.C. 7413(b) and (c)(1). The civil enforcement provision, however, clearly empowers the Administrator to seek injunctions as well as to recover civil penalties (§ 113(b)), while the criminal provisions state that a knowing violator may "be punished by a fine * * * or by imprisonment for not more than one year, or by both" for a first offense (§ 113(c)(1)). Thus, there are significant differences.

Petitioner Ethyl (Pet. 7-8) contends that the civil actions should be analogized to criminal proceedings because the civil penalties sought are "penal" in nature. Petitioner ignores that the complaints filed by the government requested injunctive relief as well as civil penalties. Injunctive relief, of course, is addressed to the federal court sitting in equity and is entirely civil in nature. See *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 311-312 (1982). Moreover, analysis of the civil penalty provision of Section 113(b) compels the conclusion that it is not primarily punitive, see

United States v. *Ward*, 448 U.S. 242, 254 (1980), and has been administered to effectuate compensatory objectives.[12]

Petitioners also assert that, even if the present enforcement actions are found to be entirely civil in character, *Adamo Wrecking* and Section 307(b)(2) should be read to afford civil defendants the right to challenge the facial validity of the Administrator's regulations because federal statutes should be given the same construction in both civil and criminal applications. Petitioners rely primarily upon *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) (85-334 Pet. 7-9; 85-376 Pet. 8), in making this argument. In that case the Court held that the phrase "any lottery, gift enterprise, or similar scheme" did not mean one thing in a criminal prosecution under 18 U.S.C. 1304 and something else in FCC regulations prohibiting violations of Section 1304 by broadcasters. 347 U.S. at 296 n.18. Nothing in the Court's opinion suggests that a facial inquiry into whether a regulation is an emission standard is required in both civil and criminal enforcement actions.[13]

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[12]The EPA Civil Penalty Policy calculates penalties within the statutory maximum by evaluation, inter alia, of the environmental damage involved, the economic benefit enjoyed by the violator through its noncompliance, and extraordinary enforcement costs incurred. See *EPA Civil Penalty Policy*, 8 Env't Rep. (BNA) 2011, 1012 (1978); see also 15 Env't Rep. (BNA) 885 (1984).

[13]Firestone notes (Pet. 8) that the Court stated that the construction of Section 1304 urged by the FCC "would likewise apply in criminal cases," contrary to the "well-established principle that penal statutes are to be construed strictly" (347 U.S. at 296). This case is obviously different since we are not suggesting that a facial inquiry into whether a particular regulation is an emission standard is not required in criminal cases; *Adamo Wrecking* forecloses such an argument. It does not follow from *FCC* v. *American Broadcasting Co., supra*, that a similar inquiry must be available in civil cases. That decision at most suggests a need for similarity of substantive statutory interpretation when the substantive issue is properly raised.

Accordingly, the court of appeals was entirely correct in holding that a facial inquiry into whether the vinyl chloride regulations are emission standards is not required in these civil enforcement cases. Having failed to raise the issue in challenging the regulations following their promulgation, petitioners are now precluded by Section 307(b)(2) from litigating the issue in civil enforcement proceedings. Moreover, this case is the first court of appeals decision concerning whether *Adamo Wrecking* applies to a civil enforcement proceeding pursuant to Section 113(b) of the Clean Air Act.[14] There will be an opportunity for this Court to review this question should there be a decision by another court of appeals in the future that conflicts with the court of appeals' decision in this case. Moreover, in the present case, the court of appeals, as an alternative ground for its decision, afforded petitioners *Adamo Wrecking*-type review and, as we have shown, its holding rejecting their claim on the merits does not warrant this Court's review. There is, accordingly, no occasion here for review of the *Adamo Wrecking* issue.

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[14]Contrary to petitioners' claims (85-334 Pet. 9; 85-376 Pet. 10), *Hooker Chemical Co.* v. *United States*, 642 F.2d 48 (3d Cir. 1981), is not in conflict with the court of appeals' decision. *Hooker Chemical Co.* was a Section 307(b)(1) challenge to an EPA order—not an enforcement proceeding—and the court's statements concerning *Adamo Wrecking* were mere dicta. See also *Luckie* v. *EPA*, 752 F.2d 454, 456-457 (9th Cir. 1985) (*Adamo Wrecking* is "inapplicable" in citizens suit under Section 304 (42 U.S.C. 7604) of the Act because "no criminal charges" are involved).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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